Supreme Court, U.S.
FILED
AUG 8 1991
OFFICE OF THE CLERK

No. 90-5844

In The

Supreme Court of the United States

October Term, 1991

TERRY FOUCHA,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ Of Certiorari To The Louisiana Supreme Court

REPLY BRIEF FOR THE PETITIONER

MARTIN E. REGAN, JR.
JAMES P. MANASSEH*
336 Louisiana Avenue
Second Floor
Baton Rouge, Louisiana 70802
(504) 383-9703

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 90-5844

In The

Supreme Court of the United States

October Term, 1991

TERRY FOUCHA,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ Of Certiorari To The Louisiana Supreme Court

REPLY BRIEF FOR THE PETITIONER

REPLY BRIEF

The State of Louisiana, in its opposing brief in No. 90-5844, suggests that this Honorable Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987) can and should be extended in a manner so as to legitimize the State's scheme for the indefinite confinement of Terry Foucha solely on the grounds that he did not prove that he was not dangerous.

While it is conceded that there is a similarity between the defendants in *Salerno* and your petitioner, Mr. Foucha, in that both involve the detainment of individuals who have not been convicted of a crime, it is urged that the

State's linkage of the cases is flawed due to substantial distinctions which the State failed to articulate in its brief.

First and foremost, the Bail Reform Act requires that the Government demonstrate by clear and convincing evidence that no conditions for release will reasonably assure the safety of any other persons and the community. 18 U.S.C. Section 3142(e). The factors to be considered by the lower court are specifically delineated by the act. It is suggested that there is a profound distinction between the affirmative burden placed upon the Government to establish dangerousness as required by the Bail Reform Act as opposed to Mr. Foucha's burden, as per the Louisiana statutory scheme, to establish a negative proposition, i.e. that he does not present a danger.

This Court's opinion in *Salerno* clearly indicates the significance of having the Government establish by clear and convincing evidence that no condition of release would ensure the safety of the community.

At 481 U.S. 750 this Court said:

> "The Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U.S.C. Section 3142(f)."

The opinion went on.

> "While the Government's general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee . . . presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at it's greatest."

Finally, the Court at page 751 specifically stated the factors required to establish the particular circumstances necessary to overcome the individual's strong interest in liberty. The Court stated that:

> "When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a Court may disable the arrestee from executing that threat . . ."

It is clear that this decision was limited to this very specific set of circumstances. Moreover, this Court recognized the proposition that the Government may not detain a person prior to a judgment of guilty in a criminal trial as a "general rule", with but, a limited number of exceptions based upon "special circumstances". Such "special circumstances" include the detainment of enemy aliens during time of war, *Ludecke v. Watkins*, 335 U.S. 160 (1948); and the jailing without probable cause in time of insurrection, *Moyer v. Peabody*, 212 U.S. 78 (1909), along with the detention of potentially dangerous resident aliens pending deportation proceedings, *Carlson v. Landon*, 342 U.S. 524 (1952). While the State found support in *Addington v. Texas*, 441 U.S. 418 (1979), it is urged that that situation dealt with the detainment of persons who were presently mentally unstable. That is a very different circumstance than detaining a completely sane individual as is the case with Mr. Foucha. Moreover, even the *Salerno* case and *Scholl v. Martin*, 467 U.S. 253 (1984), dealing with post arrest, pre-trial detention of juveniles, is significantly less imposing upon the subject detainee than the present Louisiana scheme, in that all the former varieties of permissible confinements are limited to the

duration of the pending circumstances. Whether it be a pending trial or military encounter, the period of detention is finite and, thus, less offense to the interests of liberty. Mr. Foucha's compulsory psychiatric confinement is of a potentially unlimited nature. His stay is for life or until he can prove that he is not dangerous. A burden which renders to the judicial officer unbridled discretion in making the detention determination.[1]

It is urged that the reasoning of *Salerno* is inapplicable to the particular circumstances of the present case and the Louisiana scheme for the continued confinement of insanity acquittees is violative of your Petitioner's Constitutional rights.

Respectfully submitted,

REGAN & ASSOCIATES

/s/ JAMES P. MANASSEH

JAMES P. MANASSEH
336 Louisiana Avenue
Second Floor
Baton Rouge, Louisiana 70802
(504) 383-9703

Counsel for Petitioner

---

[1] This type of unbridled discretion was looked upon with disfavor by this Court in *United States v. Salerno*, 481 U.S. at 742 (1987).